No. 97-1072

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

VIRGINIA STATE CORPORATION COMMISSION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION

and

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE REGIONAL BELL COMPANIES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 276—which directs the FCC "to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call," and which specifies that the FCC's payphone regulations "shall preempt" "any State requirements [that] are inconsistent with the Commission's regulations" —unambiguously authorizes the FCC to regulate intrastate payphone rates and to preempt inconsistent state regulations.

2. Whether the FCC's regulations—which offer States a choice of either eliminating any payphone requirements that impede competition or having such requirements preempted by federal regulation—are consistent with the Tenth Amendment.

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the United States Court of Appeals for the District of Columbia Circuit are as set forth in petitioner's brief at Pet. ii-iv and at Pet. App. 6-8 in proceeding 96-1394, *et al.*

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Company, Bell Atlantic Global Funding Corporation. In addition, Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Ceullar Telephone Company, Allentown SMA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company, Anderson Cellular Telephone Company, Las Cruces Cellular Telephone Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Global Directory Services Hellas, S.A., NYNEX Worldwide Directories Company, Kipling

Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

BellSouth Corporation has no parent companies. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, InfoVentures of Atlanta, Beijing Ji Tong-BellSouth Communication & Information Engineering Co., Ltd., Compania de Radiocomunicaciones Moviles S.A., Telcel Celular C.A., Tele 2000, S.A., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data C.V., RAM Mobile Data Limited, BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Huntsville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, and Terre-Haute Cellular Telephone Company, Inc.

SBC Communications Inc., which has shares outstanding in the hands of the public, is the parent company of Southwestern Bell Telephone Company and Southwestern Bell Yellow Pages, Inc. SBC Communications Inc. has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco, Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership,

McAllen/Edinburgh SMSA Limited Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV) Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

U S WEST, Inc. has no parent company. Financial Security Holdings, Ltd. is a non-wholly owned subsidiary of U S WEST, Inc.

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BRIEF OF THE REGIONAL BELL COMPANIES IN OPPOSITION

Bell Atlantic Corporation, BellSouth Corporation, SBC Communications Inc., and U S WEST, Inc. respectfully oppose the petition for a writ of certiorari.

Relying on the plain text of the Telecommunications Act of 1996 (the "1996 Act") and applying the principles of *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986), the D.C. Circuit concluded that Congress expressly empowered the FCC to regulate intrastate payphone rates and to preempt inconsistent state regulations. That conclusion is correct, and petitioners' claim of a circuit conflict is wholly implausible. Nor is there any substance to petitioners' alternative assertion that the FCC's

payphone regulations violate the Tenth Amendment. The questions presented here fall far short of this Court's usual threshold for certiorari.

STATEMENT OF THE CASE

1. The 1996 Act. Prior to the 1996 Act, payphone service providers ("PSPs") were compensated through a hodge-podge of federal and state regulatory mechanisms, including subsidies from other services. Of most importance here, States typically set the price PSPs charged for local coin calls, often at artificially low levels.

As part of its "pro-competitive, de-regulatory national policy framework" for the telecommunications industry, S. Conf. Rep. No. 104-230, at 1 (1996), Congress directed the FCC to eliminate this patchwork of compensation mechanisms and in its place "establish a per call compensation plan to ensure that all payphone service providers are *fairly compensated* for *each and every* completed *intrastate* and interstate call using their payphone" (except for emergency and hearing-disabled calls). 47 U.S.C. § 276(b)(1)(A) (emphasis added). Congress also directed the FCC to "discontinue . . . all intrastate and interstate payphone subsidies . . . in favor of [this new] compensation plan." *Id.* § 276(b)(1)(B). Finally, Congress made clear that the FCC's regulations governing compensation for intrastate and interstate payphone calls "shall preempt" any state requirements that are "inconsistent" with those regulations. *Id.* § 276(c).

2. The FCC's Order. Responding to Congress's direction, the FCC examined the payphone marketplace and concluded that "the most appropriate way to ensure that PSPs receive fair compensation for each call is to let the market set the price for individual calls originated on payphones." Pet. App. 64. Therefore, beginning one year after the effective date of the regulations, "the market will be allowed to set the rate for local coin calls, unless the

state can show that there are market failures within the state that would not allow market-based rates." *Id.* at 66. Although it recognized that States historically set local call rates, the FCC concluded that the express terms of section 276(b)(1)(A) give it "both the jurisdiction to ensure fair compensation for local coin calls and the mandate to establish a plan to compensate PSPs on a per-call basis." *Id.* at 70.

The FCC also provided that each State must examine its payphone regulations during the one-year transition period "to review and remove, if necessary, those regulations that affect competition, such as entry and exit restrictions." *Id.* at 65. Relying on the preemption provision of section 276(c), the FCC concluded that "for purposes of ensuring fair compensation through a competitive marketplace, the state should remove only those regulations that affect payphone competition; the states remain free at all times to impose regulations, on a competitively neutral basis, to provide consumers with information and price disclosure." *Id.* at 71-72. In the absence of such state action, the FCC indicated, it would itself be forced to preempt any state regulations that constitute a barrier to a fully competitive payphone market. *Id.* at 70.

3. The D.C. Circuit's Decision. In challenging the agency's order, petitioners claimed that the FCC lacks jurisdiction to deregulate, and thereby to prevent the States from regulating, rates for local coin calls. The D.C. Circuit disagreed.

a. The court of appeals began by noting that Congress had established in the Communications Act of 1934 a "dual system of state and federal regulation of telephone service." Pet. App. 16. While the 1934 Act granted the FCC the power to regulate interstate and foreign commerce in wire and radio communications, section 2(b) of that Act provides that " 'nothing in [the Act] shall be construed to apply or give the Commission jurisdiction with

respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.'" *Id.* (quoting 47 U.S.C. § 152(b)). As a result, the court recognized that "§ 276 should not be read to confer upon the FCC jurisdiction over local coin rates *unless* § 276 is 'so unambiguous or straightforward so as to override the command of § 152(b).'" *Id.* (quoting *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 377 (emphasis added)). Based upon the plain terms of section 276, the D.C. Circuit concluded that it did provide just such an unambiguous and straightforward grant of authority.

In section 276, Congress directed the FCC (not the States) to ensure that all PSPs are "fairly compensated for each and every completed *intrastate* and interstate call [using their payphones]." 47 U.S.C. § 276(b)(1)(A) (emphasis added). According to the D.C. Circuit, "[i]t is undisputed that local coin calls are among the intrastate calls for which payphone operators must be 'fairly compensated.'" Pet. App. 17. "[T]he only question," therefore, "is whether in § 276 the Congress gave the Commission the authority to set local coin call rates in order to achieve that goal." *Id.* The court concluded that it did. Section 276 "unambiguously grants the Commission authority to regulate the rates for local coin calls," the court explained, because the only compensation a PSP receives for a local call "is in the form of coins deposited into the phone by the caller." *Id.* at 17-18.

The court rejected petitioners' argument that Congress would not have used the term "compensation" to refer to rates paid by callers. The court found that Congress had used this term in precisely this way in other parts of the Communications Act. For example, in section 226(e)(2), Congress provided that "[t]he Commission shall consider the need to prescribe *compensation* (other than advance payment by consumers) for owners of competitive public pay telephones. . . ." 47 U.S.C. § 226(e)(2). If petition-

ers were correct that the term "compensation" does not encompass payments by callers, "then the parenthetical exception would be mere surplusage." Pet. App. 17. Similarly, in section 203(c), Congress provided that a common carrier may not "charge, demand, collect, or receive a greater or less or different compensation . . . than the charges specified in the schedule" available to its customers. 47 U.S.C. § 203(c)(1). And in section 309(j), Congress directed that competitive bidding for a license or construction project apply to mutually exclusive uses of the electromagnetic spectrum where the principal use of such spectrum involves "the licensee receiving compensation from subscribers." *Id.* § 309(j)(2)(A); Pet. App. 17.

b. Petitioners filed separate petitions for rehearing in which they not only reargued the scope of the FCC's authority over local coin rates but also suggested for the first time that the FCC's order violated the Tenth Amendment. They argued that "state executive officials and state legislative officials cannot be made to work for the federal government by Congress' decreeing that they enforce or enact federal policy." Pet. App. 98; *see also id.* at 110 (urging rehearing because the earlier decision "implicitly approves of state policy-making apparatus being enlisted in support of the accomplishment of a federal agency's policies"). The D.C. Circuit panel rejected the rehearing petitions without opinion, *id.* at 37-38, and the full court denied the suggestion for rehearing *en banc*, *id.* at 39-40.

ARGUMENT

I. THE D.C. CIRCUIT'S JURISDICTIONAL RULING WAS CORRECT AND RESTS ON THE PLAIN LANGUAGE OF THE STATUTE

The D.C. Circuit fully adhered to this Court's repeated admonition that, in a statutory interpretation case, the federal judiciary's primary responsibility is to "give effect

to the clear meaning of statutes as written." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992). Focusing on the plain language of section 276, the panel correctly concluded that Congress had unambiguously and straightforwardly "grant[ed] the Commission authority to regulate the rates for local coin calls." Pet. App. 18. That correct understanding of particular statutory provisions raises no general legal issue, conflicts with no other circuit court decision, and has had no adverse effect on implementation of the 1996 Act. Further review is not warranted.

a. Congress could hardly have been clearer in authorizing the FCC to regulate the compensation of PSPs for local calls. The statute expressly empowers the FCC to ensure fair compensation for all *intrastate* payphone calls, including local coin calls. 47 U.S.C. § 276(b)(1)(A) (instructing the Commission to establish a "per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone"). Moreover, the statute directs the FCC to eliminate *intrastate* subsidies—a task that requires the elimination of artificially low local coin rates. *Id.* § 276(b)(1)(B) (requiring regulations that "discontinue . . . all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues"). Finally, the statute expressly preempts any state requirement inconsistent with the FCC's payphone regulations. *Id.* § 276(c) ("[t]o the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements").

In the face of the FCC's clear statutory authority to regulate compensation for local calls, petitioners suggest only that the FCC should have declined to exercise jurisdiction over the rates paid by end-users. Pet. 18. But the FCC disagreed, concluding that it had "an obligation under Section 276 to ensure that the compensation for all

local coin calls is fair" and "that the market should be allowed to set the price for all compensable calls, including a local coin call." Pet. App. 69. The FCC accordingly prescribed regulations that establish a market-based compensation plan—including market-based local coin rates—and the statute plainly preempts any state regulations that interfere with this compensation plan. Whether the FCC might have satisfied its statutory responsibilities in some other way is simply irrelevant to the jurisdictional question.

b. Petitioners' reliance on section 152(b) is unavailing. Although that provision bars *implied* federal jurisdiction—and thereby forecloses unauthorized FCC intrusions upon the States' traditional authority over intrastate communications—its prohibition does not apply where, as here, Congress has *expressly* given the FCC jurisdiction to regulate specific intrastate services. Applying the controlling principles of *Louisiana Public Service Commission*, the D.C. Circuit correctly concluded that section 276 expressly and unambiguously authorizes the FCC to regulate intrastate payphone rates and that Congress made its jurisdictional intentions sufficiently clear to "override the command of § 152(b)." 476 U.S. at 377. There is no reason for this Court to review so straightforward an application of settled principles.

Petitioners implausibly contend that section 276 "does not show an intent to authorize specific FCC rate preemption." Pet. 18. It is difficult to see what else Congress could have meant when it first directed the FCC to prescribe regulations ensuring that all PSPs are fairly compensated for each and every completed intrastate call and then provided that the FCC's regulations on such matters "shall preempt [inconsistent] State requirements." 47 U.S.C. § 276(b)(1)(A), (c).

Petitioners assert that Congress's jurisdictional intentions are no clearer here than they were in *Louisiana PSC*. Pet. 13. But the express textual evidence the Court

found lacking in *Louisiana PSC* is present here. As this Court there explained, "despite the sweeping language of § 220, nowhere does it even allude to, let alone expressly refer to, depreciation as a component of state ratemaking. Nor is the word 'pre-emption' used." 476 U.S. at 377. In marked contrast, section 276 *does* expressly authorize the FCC to regulate the compensation for "each and every completed *intrastate*" payphone call. 47 U.S.C. § 276(b)(1)(A). And, unlike section 220, section 276 *does* expressly preempt inconsistent state requirements. 47 U.S.C. § 276(c). Congress thus left no jurisdictional ambiguity in section 276: it plainly authorized the FCC to regulate the rates for intrastate payphone calls. Nothing more is required.

Petitioners contend that if Congress had truly intended to give the FCC preemptive jurisdiction over local payphone rates, it would have included in section 276 the phrase "notwithstanding § 152(b)" (as it had done in some provisions enacted after *Louisiana PSC*), and it would have included in section 152(b) an express exemption for section 276. Pet. 17. According to petitioners, "[t]he absence of explicit override language in § 276 demonstrates that Congress did not intend to confer upon the FCC authority to preempt states in determining local coin rates." *Id.* But petitioners cite no authority for their view that Congress may override the command of section 152(b) only by following this precise textual formula. Where, as here, Congress makes its jurisdictional intentions entirely clear—by expressly and unambiguously empowering the FCC to regulate a category of "intrastate" communications and by explicitly preempting conflicting state requirements—those intentions must be honored.

c. Petitioners' final argument is that this case conflicts with the Eighth Circuit's jurisdictional ruling in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), a decision that this Court recently agreed to review. *AT&T Corp., et al. v. Iowa Utils. Bd., cert. granted*, 66 U.S.L.W. 3490 (Jan. 26, 1998) (Nos. 97-826, et al.).

As petitioners admit (Pet. 19 n.4), however, the Eighth Circuit, in reviewing a different statutory provision, pointed to section 276 as a model of how Congress acts when it intends unambiguously to confer intrastate jurisdiction: "[S]ection 276 . . . itself directly requires the FCC to establish a compensation plan regarding both intrastate and interstate pay phone calls. The FCC's roundabout construction in its effort to claim intrastate pricing authority under section 251 . . . is notably strained in stark comparison to the *direct grant of such authority contained . . . in section 276. . . .*" 120 F.3d at 797 (emphasis added and citations omitted).

There is no conflict between the D.C. Circuit's decision in this case and the Eighth Circuit's decision in *Iowa Utilities Board*. Two courts, applying identical legal principles to different statutory provisions, came to perfectly consistent conclusions about when the FCC has authority to preempt state regulation. The difference in outcome simply reflects the difference in the language of the two sections.

For the same reason, this Court should *not* hold this petition pending its decision in *Iowa Utilities Board*. The question before the Court in that case is whether the FCC has jurisdiction to regulate rates and other terms of local interconnection under sections 251 and 252. Whatever the Court may ultimately decide about the scope of the FCC's authority under these sections, its decision will have no effect on the scope of the FCC's authority to regulate local payphone rates under section 276. These are entirely separate statutory provisions, and the Court's disposition of *Iowa Utilities Board* will not aid, much less control, the determination of the jurisdictional issue in this case.

II. PETITIONERS' TENTH AMENDMENT ARGUMENT IS INSUBSTANTIAL

Petitioners argue that the FCC's regulations violate the Tenth Amendment "by conscripting states and state agen-

cies to implement federal regulations." Pet. 20. Specifically, petitioners claim that, by requiring States to conduct evaluations of state policies and to provide, fund, and administer programs consistent with federal policy, "[t]his federal requirement clearly goes beyond delegating merely ministerial tasks, and imposes upon the states, in their sovereign capacities, a policy-making, program-enacting role pursuant to § 276." *Id.* at 21.

As an initial matter, this issue was never even decided by the court below because petitioners raised it for the first time in their petition for rehearing. The rule in the D.C. Circuit, as in virtually all courts of appeals, is that courts traditionally "refuse[] to consider issues presented for the first time on rehearing, absent exceptional circumstances." *United States v. Byers*, 740 F.2d 1104, 1125 n.19 (D.C. Cir. 1984) (concurring opinion); *Bullock v. Maryland*, 509 F.2d 384, 388 (D.C. Cir. 1974). Even assuming that this Court would have jurisdiction in these circumstances to consider a claim waived in the court below, petitioners' failure to present the issue in their appellate briefs, and the D.C. Circuit's refusal to address it, counsels strongly against a discretionary grant of plenary review on the issue.

In any event, the argument borders on the frivolous. Petitioners simply fail to grasp the central distinction between Congress's directing States to regulate in a particular field—which is generally impermissible—and Congress's directing States not to regulate in a way that interferes with federal policy in a particular field. "[T]he Federal Government may displace state regulation even though this serves to 'curtail or prohibit the States' prerogatives to make legislative choices respecting subjects the States may consider important.'" *FERC v. Mississippi*, 456 U.S. 742, 759 (1982) (quoting *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 290 (1981)). It is also permissible, as the Court made clear in *New York v. United States*, "where Con-

gress has the authority to regulate private activity under the Commerce Clause, [the Court has] recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." 505 U.S. 144, 167 (1992) (citing *Hodel*, 452 U.S. at 288). This is precisely the choice offered to the States by the FCC's regulation of local payphone rates.

The FCC recognized that its ability to establish a market-based compensation plan for intrastate calls might be frustrated by the enforcement of incompatible state regulations. "Many states impose regulations on PSPs, including certain requirements that must be fulfilled before a PSP can enter or exit the payphone marketplace. We conclude that these state regulations are barriers to a fully competitive payphone market. . . ." Pet. App. 70. The FCC invoked its explicit authority to preempt any State requirements that are inconsistent with the Commission's regulations, yet it took pains to ensure that States remove only "those regulations that affect payphone competition." *Id.* at 71-72. States remain "free at all times to impose regulations, on a competitively neutral basis, to provide consumers with information and price disclosure." *Id.* at 72.

The requirement that States take steps to ensure that their own regulations do not interfere with federal policy is a far cry from the "[f]ederal commandeering of state governments" invalidated in *Printz v. United States*, 117 S. Ct. 2365, 2379 (1997). In stark contrast to the Brady Act, whose "whole *object*," according to the Court, was "to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty," *id.* at 2383, the FCC's payphone regulations are designed simply to ensure that States take all steps necessary to ensure that their own regulations are not inconsistent with the federal, market-based compensation plan. The Court clearly stated in *Printz* that "[t]he Federal Gov-

ernment may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 2384. But nothing in the Court's Tenth Amendment cases prohibits a federal agency acting pursuant to clearly delegated congressional authority from requiring States to eliminate any inconsistencies between their regulations and federal law or from preempting those inconsistent regulations that a State refuses to modify. This is all the FCC has done in its payphone order, and petitioners' attempt to invoke the Tenth Amendment to challenge that order is meritless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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